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Supreme Court, U.S.
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No. 02-

IN THE
Supreme Court of the United States

JOHN BRECKENRIDGE AND SHIRLEY BRECKENRIDGE,

Petitioners,

v.

NATIONSBANK OF TEXAS, N.A.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Sixth Appellate District of Texas

PETITION FOR WRIT OF CERTIORARI

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73 pp

QUESTION PRESENTED

Which party bears the burden of pleading and proof with regard to the exemption provision of the Truth-in-Lending Act, 15 U.S.C. § 1603? In other words, is the Plaintiff-Consumer required to prove that the exemption provision does not apply or does the Defendant-Creditor bear the burden of pleading and proving that an exemption to the Truth-in-Lending Act applies?

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

John Breckenridge, Petitioner and Appellant Below

Shirley Breckenridge, Petitioner and Appellant Below

Richard Haas, Appellant Below

Karen Haas, Appellant Below

NationsBank of Texas, N.A., now known as Bank of America, N.A., Respondent and Appellee Below

Hereinafter, the Petitioners will be referred to as "the Breckenridges," and NationsBank of Texas, N.A. will be referred to as "the Bank."

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(1) First opinion of the Court of Appeals for the Sixth Appellate District: 2002 Tex. App. LEXIS 1973 (March 19, 2002)

(2) Second opinion of the Court of Appeals for the Sixth Appellate District: 2002 Tex. App. LEXIS 3045, 3365 (May 1, 2002)

(3) Third opinion of the Court of Appeals for the Sixth Appellate District: 79 S.W.3d 151 (Tex. App. - Texarkana 2002, pet. denied)

(4) Order of Texas Supreme Court dated September 5, 2002 denying petition for review: no citation

(5) Order of Texas Supreme Court dated October 31, 2002 denying motion for rehearing: no citation

STATEMENT OF THE BASIS FOR JURISDICTION

Petitioners are seeking review of the final opinion of the Court of Appeals for the Sixth Appellate District of Texas entered on May 21, 2002. Since the entry of that court's judgment and opinion on May 21, 2002, Petitioners filed a timely petition for review to the Texas Supreme Court on July 5, 2002 which was denied by that court on September 5, 2002. Petitioners then timely filed a motion for rehearing with the Texas Supreme Court on September 20, 2002 which was denied by that court on October 31, 2002.

Pursuant to 28 U.S.C. § 1257, the United States Supreme Court has jurisdiction to review on a writ of certiorari the judgment of the Court of Appeals for the Sixth Appellate District of Texas relating to the viability of a Truth-in-Lending Act counterclaim. Specifically, this Court should exercise jurisdiction, because the state court below has decided an important federal question in a way that conflicts with relevant decisions of this Court.

FEDERAL STATUTES INVOLVED IN CASE

Petitioners rely upon 15 U.S.C. §§ 1603 and 1605(f) in their petition for certiorari. These statutory provisions are set forth verbatim as follows:

(A) 15 U.S.C. § 1603 Exempted transactions

This subchapter does not apply to the following:

(1) Credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes or to government of governmental agencies or instrumentalities, or to organizations.

(2) Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.

(3) Credit transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer, in which the total amount financed exceeds $25,000.

(4) Transactions under public utility tariffs, if the Board determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.

(5) Transactions for which the Board, by rule, determines that coverage under this subchapter is not necessary to carry out the purposes of this subchapter.

(6) [Reserved]

(7) Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.).

(B) **15 U.S.C. § 1605(f)**

(f) Tolerances for Accuracy

In connection with credit transactions not under an open end credit plan that are secured by real property or a dwelling, the disclosure of the finance charge and other disclosures affected by any finance charge ----

(1) shall be treated as being accurate for purposes of this title if the amount disclosed as the finance charge —

(A) does not vary from the actual finance charge by more than $100; or

(B) is greater than the amount required to be disclosed under this title; and

(2) shall be treated as being accurate for purposes of section 1635 of this title if —

(A) except as provided in subparagraph (B), the amount disclosed as the finance charge does not vary from the actual finance charge by more than an amount equal to one-half of one percent of the total amount of credit extended; or

(B) in the case of a transaction, other than a mortgage referred to in section 1602(aa) of this title, which —

(i) is a refinancing of the principal balance then due and any accrued and unpaid finance charges of a residential mortgage transaction as defined in section 1602(w) of this title, or is any subsequent refinancing of such a transaction; and

(ii) does not provide any new consolidation or new advance,

if the amount disclosed as the finance charge does not vary from the actual finance charge by an amount equal to one percent of the total amount of credit extended.

STATEMENT OF THE CASE

On or about March 9, 1998, Appellants John Breckenridge and Shirley Breckenridge signed a retail installment contract with Victory Homes for the purchase of a mobile home. This purchase was to provide a home for their daughter, Karen Haas, and her immediate family.

At the time the retail installment contract was signed by the Breckenridges, it is undisputed that the initial and subsequent due dates for the monthly installment payments were not disclosed. In fact, part of the contract was blank at the time it was signed by the Breckenridges. The contract was assigned by the seller to the Bank. When the Bank received the contract as an assignee of the seller, Victory Mobile Homes, the absence of any disclosure of the initial and subsequent due dates was apparent from the face of the contract and other assigned documents.

On March 19, 1999, the Bank sued the Breckenridges for damages arising from a purported breach of the retail installment contract for the sale of a mobile home and for possession of the mobile home which served as collateral under the contract. By a First Amended Answer and Counterclaim filed on June 26, 2000, the Breckenridges raised a Truth-in-Lending claim as a form of recoupment, alleging that the retail installment contract containing the required Truth-in-Lending disclosures failed to state the first payment due date in violation of 15 U.S.C. § 1638(a)(6) and seeking to impose assignee liability on the Bank under 15 U.S.C. § 1641(a) and (e) because the violation was apparent from the face of the assigned documents. After a trial on September 5, 2000, the trial court entered a judgment on December 19, 2000 that denied the Breckenridges all relief under their Truth-in-Lending counterclaim. Findings of fact and conclusions of law also issued simultaneously with the judgment on December 19,

2000 make no mention of the Breckenridges' Truth-in-Lending counterclaim, although it was discussed in detail in the proposed findings of fact and conclusions of law filed by the Breckenridges on October 4, 2000.

The applicability of the exemption provisions of the Truth-in-Lending Act, however, were not raised by any party in the trial court below before a final judgment was entered on December 19, 2000, and none of the exemptions were cited in the judgment itself. No party filed any pleading with the trial court prior to entry of final judgment which dealt with the applicability of any exemption to the Truth-in-Lending Act. In particular, the Bank made no mention of an exemption to the Truth-in-Lending Act in either of its two answers to the Breckenridges' counterclaims. In addition at trial, there is not one single mention of the applicability of any exemption to the Truth-in-Lending Act. Moreover, the trial court asked the parties to prepare proposed findings of fact and conclusions of law in lieu of closing argument, and the Bank's proposed findings of fact and conclusions of law filed on October 2, 2000 make absolutely no reference to any exemption to the Truth-in-Lending Act.

On October 1, 2001, over 9 months after entry of a final judgment by the trial court, the Bank asserted *for the first time* that an exemption set forth in 15 U.S.C. § 1603(3) applied to the transaction at issue, arguing that this credit transaction was exempt from the Truth-in-Lending Act given the amount financed exceeded $25,000 and the mobile home being financed was not the principal residence of the buyers, the Breckenridges. By an order dated November 20, 2001, the Court of Appeals for the Sixth Appellate District of Texas abated the appeal and ordered the trial court to enter additional findings of fact and conclusions of law on a number of issues, including the Breckenridges' Truth-in-Lending counterclaim. On December 10, 2001, almost a full year after a final judgment

had been entered, the Bank *for the first time* explicitly asserted *to the trial court* the applicability of the Truth-in-Lending exemption set forth in 15 U.S.C. § 1603(3) by filing proposed Additional Findings of Fact and Conclusions of Law. On December [before the 20th when received by Court of Appeals], 2001, the trial court issued additional findings of fact and conclusions of law which found, inter alia, that the Breckenridges' Truth-in-Lending counterclaim was barred by the exemption in 15 U.S.C. § 1603(3). Thus, the trial court addressed the issue of the Truth-in-Lending exemption *for the first time* on abatement of the appeal almost a full year after a final judgment had been entered.

After the issue of Truth-in-Lending exemption was first raised in the Bank's first brief on appeal, the Breckenridges filed a Reply Brief on November 26, 2001 which asserted the exemption was an affirmative defense to their Truth-in-Lending counterclaim which had been waived by the Bank through its failure to plead the defense prior to trial, to raise it at trial or to propose findings of fact and conclusions of law on the defense after trial as requested by the trial court. In essence, the Breckenridges argued that the exemptions set forth in 15 U.S.C. § 1603 constituted affirmative defenses, thereby imposing the burden of pleading and proving the exemptions on the Bank. In its first opinion issued on March 19, 2002, the Court of Appeals found that it was the Breckenridges' burden, as plaintiffs, to prove the applicability of the Truth-in-Lending Act and that includes disproving the applicability of the exemptions in 15 U.S.C. § 1603.

By a motion for rehearing timely filed on April 3, 2002, the Breckenridges sought to persuade the Court of Appeals to rethink its ruling on the placing of the burden of proof. After obtaining leave from the Court of Appeals, the Breckenridges filed an amended motion for rehearing on April 8, 2002 and made reference to the recent ruling of the United States Court

of Appeals for Sixth Circuit in *Inge v. Rock Financial Corporation* issued on February 26, 2002which found the tolerance of error provision of the Truth-in-Lending Act, 15 U.S.C. § 1605(f)(1)(A), to be a form of affirmative defense, thereby placing the burden of pleading and proof on the defendant. In its second opinion issued on May 1, 2002, the Court of Appeals overruled the motion for rehearing and issued a substitute opinion which explicitly ruled that "the Bank did not have to plead the transaction's exemption as an affirmative defense . . . ." By a second motion for rehearing timely filed on May 16, 2002, the Breckenridges again argued that the exemptions in 15 U.S.C. § 1603 were potential affirmative defenses which were waived by the Bank below. In its third and final opinion issued on May 21, 2002, the Court of Appeals overruled the Breckenridges' second motion for rehearing and issued another substitute opinion which again found that the Truth-in-Lending Act placed the burden on consumer plaintiffs to disprove the applicability of the statutory exemptions as an element of their case.

On July 5, 2002, the Breckenridges timely filed a petition for review with the Texas Supreme Court which raised once again the argument that the Truth-in-Lending Act places the burden of pleading and proving the statutory exemptions on the defendant creditors and not upon the plaintiff consumers. On September 5, 2002, the Texas Supreme Court denied the petition for review. As authorized by Rule 64 of the Texas Rules of Appellate Procedure, the Breckenridges filed a motion for rehearing with the Texas Supreme Court on September 24, 2002, and this motion for rehearing was denied by the Texas Supreme Court on October 31, 2002. Under Supreme Court Rule 13.1 which permits the filing of a petition for writ of certiorari seeking review of the judgment of a lower state court that is subject to discretionary review by the state court of last resort within 90 days after entry of the order denying

discretionary review and Supreme Court 13.3 which finds the 90-day period begins to run from the date of the denial of any timely petition for rehearing, the Breckenridges had until January 29, 2003 to file a petition for writ of certiorari. The instant petition is timely, because it is being filed with the Clerk of the Court on January 29, 2003.

ARGUMENT

The placement of the burden of pleading and proof with regard to the Truth-in-Lending Act's exemptions has never been addressed by this Court. Nevertheless, this Court has previously stated that, as a general rule of statutory construction, the burden of proving an exemption under a special exception to the prohibitions of a statute rests on the party claiming its benefits. *N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711, 121 S.Ct. 1861, 1866, 149 L.Ed.2d 939 (2001); *United States v. First City National Bank of Houston*, 386 U.S. 361, 366, 87 S.Ct. 1088, 1092, 18 L.Ed.2d 151 (1967); *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 44-45, 68 S.Ct. 822, 827, 92 L.Ed. 1196 (1948). Applying this general rule of statutory construction to the exemptions provided by 15 U.S.C. § 1603, it is clear that the burden of proof and pleading should be placed on the defendant-creditors, because they are the parties who necessarily are claiming the benefit of non-liability flowing from application of these exemptions.

While the state and federal courts have refrained from directly ruling on the burden of proof on the Truth-in-Lending Act's exemptions, the U.S. Court of Appeals for the Sixth Circuit has recently ruled that the "tolerance of error" provision in 15 U.S.C. § 1605(f) should be treated as an affirmative defense to the Truth-in-Lending Act and not as a matter that plaintiffs must plead and prove. *Inge v. Rock Financial Corporation*, 281 F.3d. 613, 621 (6th Cir. 2002). In that case, a district court dismissed the plaintiff's Truth-in-Lending count for failure to state a claim, because the plaintiff "failed to plead that the difference between Defendant's initially disclosed finance charge and the actual finance charge exceeded $100, applying the 'tolerances for accuracy' provision of 15 U.S.C. § 1605(f)(1)(A)." *Id.* In overruling this dismissal of the TILA

claim, the Court of Appeals stated that "we reach the conclusion that Congress' remedial purpose for the TILA is best effectuated by construing the § 1605(f) tolerance provision as a *potential affirmative defense*, rather than as an essential element of a finance charge disclosure claim." *Id.* (emphasis added). In reaching this conclusion, the Court relied upon the rule of construction that, as a remedial statute, TILA's terms must be liberally construed in favor of consumers. *Id.* See also *Dillard Department Stores, Inc. v. Owens*, 951 S.W.2d 915, 917 (Tex. App. - Corpus Christi 1997, no writ)("TILA is enforced strictly against creditors and construed liberally in favor of the consumer."); *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475,477, 482 (5th Cir. 1995)("TILA is to be enforced strictly against creditors and construed liberally in favor of the consumers").

While the *Inge* case did not specifically involve the exemptions in § 1603, there is no good reason for exemptions to be treated differently from the tolerance provision in § 1605, especially given the cases from this Court which hold that exemptions to remedial statutes should ordinarily be treated as affirmative defenses in which the party seeking to rely upon the exemption has the burden of proof. Moreover, imposing a duty on plaintiffs under the Truth-in-Lending Act to plead and prove that the exemptions do not apply would stand the accepted rule of liberal construction of the Truth-in-Lending Act on its head, because it would amount to a strict interpretation of the Act in favor of creditors instead of a liberal interpretation in favor of consumers.

Given the general rule of statutory construction that the burden of proving exemptions is on the party claiming its benefits, the Breckenridges submit that the Truth-in-Lending Act exemptions should be treated as affirmative defenses or matters of avoidance which must be raised by the defending party or they are waived. As such, the opinion of the Court of

Appeals for the Sixth Appellate District of Texas in this case clearly conflicts with relevant decisions of this Court. Based on this ruling in conflict with the decisions of this Court, the Bank has been unfairly given leave to assert an exemption affirmative defense *for the first time* on appeal some nine months after entry of final judgment.

PRAYER

WHEREFORE, Petitioners John Breckenridge and Shirley Breckenridge pray that this Honorable Court reverse the judgment of the Court of Appeals for the Sixth Appellate District of Texas on the Truth-in-Lending issue and accord further relief to which they may be entitled.

Respectfully submitted,

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APPENDIX

APPENDIX

A. Opinion, Judgment and Letter of Court of Appeals for the Sixth Appellate District of Texas dated May 22, 2002

B. Opinion, Judgment and Letter of Court of Appeals for the Sixth Appellate District of Texas dated May 1, 2002

C. Opinion, Judgment and Letter of Court of Appeals for the Sixth Appellate District of Texas dated March 19, 2002

D. Letter from Texas Supreme Court dated September 5, 2002 denying petition for review

E. Letter from Texas Supreme Court dated October 31, 2002 denying motion for rehearing

APPENDIX A

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-01-00067-CV

JOHN BRECKENRIDGE, SHIRLEY BRECKENRIDGE, RICHARD HAAS, AND KAREN HAAS, Appellants

v.

NATIONSBANK OF TEXAS, N.A., Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court No. 713,780

Before Cornelius, C.J., Grant and Ross, JJ.
Opinion by Justice Ross

OPINION

Nationsbank of Texas, N.A. sued John Breckenridge, Shirley Breckenridge, Richard Haas, and Karen Haas (Appellants) for damages arising from a breach of a retail installment contract for the sale of a mobile home, and for possession of the mobile home, which served as collateral under the contract. The Bank pled breach of contract by the Breckenridges and conversion by the Haases. The Breckenridges filed counterclaims against the Bank for violations of the Truth-in-Lending Act and the Texas Deceptive Trade Practices Act.[1] After a bench trial, the court rendered judgment in favor of the Bank against the Breckenridges jointly and severally for $68,638.39, prejudgment interest from September 5, 2000, to the end of the trial, attorney's fees, postjudgment interest, all costs incurred by the Bank, and the recovery by the Bank of the mobile home. The court rendered judgment in favor of the Bank against the Haases, ordering the Haases to immediately remove themselves from and quit the mobile home. The court rendered judgment in favor of the Bank on the claims of violations of the Truth-in-Lending Act. The court rendered judgment in favor of the Breckenridges against the Bank on their counterclaim under the Deceptive Trade Practices Act (DTPA) for forum abuse, awarding the Breckenridges $115.20 and $2,500.00 in attorney's fees. The Bank does not challenge the court's ruling on abuse of forum under the DTPA.

The Appellants allege three points of error. They first contend the trial, court erred in denying their motion to dissolve

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[1] See 15 U.S.C.A. § 1601, et seq. (West 1998 & Supp. 2001); TEX. BUS. & COM. CODE ANN. § 17.01, et seq. (Vernon 1987 & Supp. 2002).

a writ of sequestration. Second, the Appellants contend the trial court erred in granting judgment in favor of the Bank because the Breckenridges established all of their affirmative defenses: (a) presentment and demand, (b) notice of default and opportunity to cure, and (c) waiver of timely payment. Finally, the Appellants contend the trial court erred in finding the Bank did not violate the Truth-in-Lending Act.

The Bank is the assignee of a retail installment contract signed by the Breckenridges. The Breckenridges signed the contract as 'joint purchasers" in March 1998 for the purchase of a mobile home from Victory Mobile Homes, a dealer located in Spring, Texas. The Breckenridges promised "to pay the Secured Party or its Assigns" in accordance with the terms of the contract. According to the testimony, the Breckenridges purchased the mobile home for the Haases, their daughter and son-in-law and the Haases were to make the payments. Although there was no written agreement, Richard testified the agreement between the Haases and the Breckenridges was that the Breckenridges were "not going to pay a dime." The installment contract for the mobile home is not assumable, and neither of the Haases is a party to that contract. There is no evidence in the record that the Breckenridges ever made any monthly payments as provided in the contract.

From the beginning of the contract, the Appellants were continuously behind in their payments to the Bank. The first payment was due in April 1998. The Bank contacted the Breckenridges on May 7, 1998, regarding the April payment and was informed the Haases were to make payments. On May 7, 1998, the Bank contacted Richard, who said he would mail the payment that day. On May 21, 1998, the Bank again contacted the Breckenridges regarding the delinquent April payment. John again informed the Bank the Haases lived in the mobile home and were to make the payments. John gave the

Bank the Haases' telephone number. Despite letters from the Bank regarding notice of default and the right to cure the default, the Appellants remained behind in payments until bringing the account current on September 23, 1998.

The Appellants made no more payments aftercuring the default in September1998. Richard testified he has no recollection of making any payments after September 1998. The Bank left messages with Richard and the Breckenridges in November regarding the October payment. On December 2, 1998, the Bank informed the Breckenridges that the Haases had failed to return the Bank's calls, that the account would not be held any longer, and that satisfactory arrangements must be made by the next day or the matter would be referred out for repossession. On December 5, 1998, the Breckenridges reported to the Bank that the Haases were not returning their calls, either. They told the Bank to proceed with posting an eviction notice and picking up the mobile home. The Haases never vacated the mobile home, and the Bank sued to recover the debt and for possession of the mobile home.

In their first point of error, the Appellants contend the trial court wrongfully issued and should have dissolved the writ of sequestration. They contend the trial court erred in finding the hearing on the motion to dissolve the writ of sequestration was untimely. On March 11, 1999, the trial court granted the Bank's ex parte application for writ of sequestration. In May 1999, Richard filed a motion pro se to quash the writ, signing it on his behalf and purportedly on behalf of his wife. Richard failed to request a hearing on the motion, but the Bank never followed through on seeking execution of the writ. In February 2000, the trial court entered a default judgment as to all four defendants, but granted a new trial in the case in March 2000. On May 22, 2000, the Appellants filed a motion to dissolve the writ of sequestration, and a hearing was set for May 31, 2000. The

hearing was postponed by informal agreement of the parties until June 29, 2000. Then, pursuant to a written Rule 11 agreement, the hearing was again postponed until August 23, 2000. On the date of the hearing, the trial court denied the Appellants' motion to dissolve the writ of sequestration without receiving any evidence, ruling on the record the hearing was untimely for not being held within ten days of the filing of the motion. See TEX. CIV. PRAC. & REM. CODE ANN. § 62.042 (Vernon 1997). The trial court denied the Appellants' motion for reconsideration on August 25, 2000.

The Bank contends the Appellants were not entitled to file the May 22, 2000, motion to dissolve the writ of sequestration because Richard had filed a motion to quash in May 1999. The Bank implies that all the Appellants were bound by Richard's motion and that the trial court could not consider the May 22, 2000, motion. However, the Bank never objected to the Appellants' filing of the May 22, 2000, motion. By failing to object, the Bank has waived this complaint on appeal. TEX. R. APP. P. 33.1. We address the Appellants' complaint that the trial court erred in failing to dissolve the writ of sequestration.

The trial court properly denied the motion to dissolve because no hearing was held within ten days of the filing of the May 22, 2000, motion. Under Section 62.042, "Unless the parties agree to an extension, the court shall conduct a hearing on the motion and determine the issue not later than the 10th day after the motion is filed." TEX. CIV. PRAC. & REM. CODE ANN. § 62.042. Rule 712a also requires that the motion to dissolve be determined not later than ten days after the motion is filed. TEX. R. Civ. P. 712a. The hearing on the motion occurred well after the ten-day requirement.

The Bank opposed the motion to reconsider the denial of the motion to dissolve, asserting that, unless all the agreements to postpone the hearing on the motion were in writing pursuant to Rule 11, the hearing was untimely. See TEX. R. CIV. P. 11. There is no written agreement in the record between the parties regarding the postponement of the May 31 hearing. There is a written agreement concerning the postponement of the June 29, 2000, hearing.

Rule 11 requires, "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." The Appellants contend Rule 11 is inapplicable. They assert that "there was no rule like Rule 11 in effect at the time the sequestration statute was amended in 1975 (nor when the amended sequestration rule was promulgated in 1978), and thereby no legislative intent to require agreements to postpone dissolution hearings to be in writing." This contention is incorrect. Rule 11 of the Texas Rules of Civil Procedure became effective on September 1, 1941. *Kennedy v. Hyde*, 682 S.W.2d 525, 528 (Tex. 1984); *Alcantar v. Okla. Nat'l Bank*, 47 S.W.3d 815,819 n.2 (Tex. App.-Fort Worth 2001, no pet.).

> This rule is not of recent origin, but can be traced in substantially its present form to District Court Rule 28, adopted in 1840 under the laws of the Republic of Texas, I Tex. 849, 852 (1848), and recodified as District and County Court Rule 47 in 1877 by authority of article V, section 25 of the Texas Constitution. See 47 Tex. 597, 625 (1877).

Kennedy, 682 S.W.2d at 526. "Rule 47 was amended in 1892 by adding the phrase 'or unless it be made in open court and

entered of record.' 84 Tex. 695, 715, 19 S.W. 889." *Id.* at 526 n.1. The portion of Rule 11 at issue in this case is unchanged since 1877. The original rationale for the rule was stated cogently in *Birdwell v. Cox*, 18 Tex. 535, 537 (1857):

> Agreements of counsel, respecting the disposition of causes, which are merely verbal, are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies; and hence there is great propriety in the rule which requires that all agreements of counsel respecting their causes shall be in writing, and if not, the court will not enforce them. They will then speak for themselves, and the court can judge of their import, and proceed to act upon them with safety. The rule is a salutary one, and ought to be adhered to whenever counsel disagree as to what has transpired between them.

Even if Rule 11 had not been in existence at the time the rules governing sequestration proceedings were adopted, the Rules of Civil Procedure govern all proceedings brought after those rules took effect September 1, 1941. TEX. R. CIV. P. 814; *Stieler v. Stieler*, 537 S.W.2d 954, 956-57 (Tex. Civ. App.-Austin 1976, writ ref n (despite referral to effective date of September 1, 1941, Rule 814 has been applied to subsequent amendments to rules).

The Appellants' alternative argument that "slavish adherence" to the language of Rule Ills not required in all cases is correct. *Kennedy*, 682 S.W.2d at 529. However, we review the trial court's adherence to such rule under an abuse of discretion standard. The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action; rather, it is a question of whether the court acted without reference to any

guiding rules or principles, and the mere fact that a trial court may decide a matter within its discretionary authority differently than an appellate court does not demonstrate such an abuse. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Under an abuse of discretion standard, the court of appeals cannot overrule the trial court's decision unless the trial court acted unreasonably or in an arbitrary manner, without reference to guiding rules or principles. *Beaumont Bank, N.A. v. Butler*, 806 S.W.2d 223, 226 (Tex. 1991). Moreover, the court of appeals cannot substitute its judgment for the trial court's reasonable judgment even if it would have reached a contrary conclusion. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992); *Beaumont Bank, N.A* 806 S.W.2d at 226. The trial court does not abuse its discretion if some evidence reasonably supports the trial cour4's decision. *Rugen v. Interactive Bus. Sys.*, 864 S.W.2d 548, 551 (Tex. App.-Dallas 1993, no writ).

In this case, the trial court did not act without guiding principles. Rule 11 clearly states the trial court is not bound by oral agreements between the parties. The trial court was faced with a hearing clearly scheduled outside the ten-day time frame mandated by statute; and there was no agreement in the record showing the parties agreed to the postponement. The trial court did not abuse its discretion in applying Rule 11.

In their second point, the Appellants complain the trial court erred in failing to file additional findings of fact and conclusions of law in response to their properly and timely requested additional findings of facts and conclusions of law on the elements of their affirmative defenses. We found that the Appellants were correct and abated the case to the trial court to

make the requested findings.[2] The trial court filed these additional findings of facts and conclusions of law, and we requested supplemental briefing from the parties as to these findings.

The Appellants contend the trial court erred in finding against them on their affirmative defenses. They contend the evidence is legally and factually insufficient to support the trial court's findings. The Appellants pled three affirmative defenses:

> (a) presentment and demand; (b) notice of default and opportunity to cure; and (c) waiver of timely payment. The Appellants had the burden of proof on their affirmative defenses. The appropriate challenge to a fact-finder's finding concerning an issue on which the complaining party had the burden of proof is either a matter of law point or a great weight and preponderance point. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275-76 (Tex. App.-Amarillo 1988, writ denied).

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The Appellants contend that, despite the language of the guaranty provision, the Breckenridges did not waive their right to presentment and demand. They assert that a strict, narrow reading of the guarantor provision is required because, in the construction of language in a contract, we ordinarily give the language its plain, grammatical meaning. *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 529 (Tex. 1987). The Appellants contend that such a reading of the guaranty provision limits the waiver of the Breckenridges to their role as guarantors and that there is no evidence the Breckenridges waived presentment and demand in their capacity as makers of the contract.

The Appellants further contend the Breckenridges may not simultaneously be makers and guarantors. Their contention is that, because the Breckenridges are already responsible for making payments under the contract as "Purchasers," their execution of the guaranty section is of no effect. They cite

Eubankv. First Nat'l Bank, 814 S.W.2d 130,133-34 (Tex. App.-Corpus Christi 1991, no writ); *Dann v. Team Bank*, 788 S.W2d 182, 184-85 (Tex. App.-DaHas 1990, no writ); and *Johnson v. Nasworthy*, 16 S.W. 758, 759-60, 4 Willson 164 (Tex. Ct. App. 1890), for the proposition that a principal obligor under a contract may not act as his or her own guarantor.

However, the Bank sued the Breckenridges generally under the note, thereby suing them in both capacities, as makers and guarantors. The Breckenridges failed to file a verified denial that they were liable under the note in their capacity as guarantors. *See* TEX. R. CIV. P. 93. Failure to verifiably deny liability in a capacity in which a party is sued waives the right to complain on appeal that such party is not liable in that capacity. Werner v. Colwell, 909 S.W.2d 866, 870 (Tex. 1995). By failing to file a verified denial that they were liable in the capacity of guarantors, the Breckenridges waived their complaint on appeal that they cannot be liable in that capacity.

In their third point of error, the Appellants contend the trial court erred in finding the Bank did not violate the Truth-in-Lending Act. The Appellants complained the trial court failed to file additional findings of fact and conclusions of law in response to their properly and timely requested additional findings of fact and conclusions of law on the elements of the Truth-in-Lending Act. We found the trial court should have filed these additional findings of fact and conclusions of law, and abated the case to the trial court to make the requested findings. The trial court filed these additional findings of fact and conclusions of law, and we requested supplemental briefing from the parties as to these findings.

The Appellants contend the trial court erred in finding the federal Truth-in-Lending Act does not apply to this case as a matter of law. The trial court held the contract evidences a transaction that is an "exempted transaction" as defined by Section 1603 of the Truth-in-Lending Act.[3] The Truth-in-Lending Act does not apply to "[c]redit transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer, in which the total amount financed exceeds $25,000." 15 U.S.C.A. § 1603(3) (West 1998). The Appellants contend the trial court erred in holding the transaction was exempt because

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[3] The following exemptions are provided in the Act:

(1) Credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations.

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(4) Transactions under public utility tariffs, if the Board determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.

(5) Transactions for which the Board, by rule, determines that coverage under this subchapter [U.S.C.A. § 1601, et seq.1 is not necessary to carry out the purposes of this subchapter.

. . . .

(7) Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.).

15 U.S.C.A. § 1603 (West 1998)

the Bank has waived this defense by failing to plead it before trial.

The Appellants contend the exemption to the statute is like an affirmative defense that is waived if not affirmatively pled. However, the burden to show that the transaction falls within the Truth-in-Lending Act is on the Appellants in this case. In order to establish the creditor's liability under the Truth-in-Lending Act, the complaining party must show that the disputed transaction is the type of transaction covered by the Act. *Katz v. Carte Blanche Corp.*, 496 F.2d 747,751 (3d Cir. 1974); *Gambosi V. Carteret Mortgage Corp.*, 894 F. Supp. 176, 180 (E.D. Penn. 1995), *aff'd without opinion*, 91 F.3d 123 (3rd Cir. 1996) (plaintiff bears burden of showing a disputed transaction is covered by Truth-in-Lending Act); *Brekke v. Volcker*, 652 F. Supp. 651, 654 (D. Mont. 1987) (plaintiffs failed to allege facts from which court could conclude Truth-in-Lending Act was applicable). " depends upon an extension of credit, wherein the underlying transaction qualifies as a consumer credit transaction and not one for 'business or commercial purposes." *Gerasta v. Hibernia Nat'l Bank*, 411 F. Supp. 176, 185(E.D. La. 1975), *affd in part & rev'd in part on other grounds*, 575 F.2d 580 (5th Cir. 1978); see 15 U.S.C.A. § 1601, 1602(h).

The Appellants point to *United States v. First City Nat'l Bank*, 386 U.S. 361, 366, 87 S.Ct. 1088, 18 L.Ed.2d 151 (1967), and *Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 44-45, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), in support of their contention the Bank had the burden of proof to show this transaction was exempt under the statute. These cases hold that the general rule is the party who claims the benefits of an exception to the prohibition of a statute bears the burden of proof. *First City Nat'l Bank*, 386 U.S. at 366; Morton Salt Co., 334 U.S. at 44-45. Both of these cases dealt with situations

where the actions of the defendants were generally prohibited by law. *First City National Bank* involved the merger of two banks and whether they were exempt from prohibitions of merging under antitrust laws via an exemption. This is not a case in the Truth-in-Lending Act. As the more recent decision from the Third Circuit holds, the burden is on the plaintiff alleging violation of the Truth-in-Lending Act to show that the transaction is the type covered by the Act. *Katz*, 496 F.2d at 751. The court found the amount financed exceeds $25,000.00; the contract relates to personal property, not real property; and the Breckenridges affirmatively represented that the mobile home acquired was not to be their principal dwelling. The evidence proves the transaction qualifies as an exempt transaction under Section 1603(3).

In their motion for rehearing, the Appellants correctly point out that the Truth-in Lending Act is to be construed strictly against creditors and liberally in favor of consumers. *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 621 (6th Cir. 2002); *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 477, 482 (5th Cir. 1995). In *Inge*, the court reversed the district court's finding that the plaintiff had failed to state a claim by holding that the plaintiff had sufficiently pled her cause of action and is limited to an interpretation of Section 1605(f) of the Truth-in-Lending Act. *Inge*, 281 F.3d at 621-22. We find the Bank did not have to plead the transaction's exemption as an affirmative defense and affirm the trial court's finding regarding the Truth-in-Lending Act. Because the Appellants did not attack the merits of the trial court's findings, we need not address whether the trial court's findings regarding the transaction were correct.

We affirm the judgment.

Donald R. Ross
Justice

Date Submitted: February 28, 2002
Date Decided: May 21, 2002
Publish

FILED IN
The Court of Appeals
Sixth District
MAY 21, 2002
Texarkana, Texas
Linda Rogers, Clerk

Court of Appeals
Sixth Appellate District of Texas

No. 06-01-00067-CV

John Breckenridge, Shirley Breckenridge, Richard Haas, and Karen Haas, Appellants v. Nationsbank of Texas, N.A., Appellee	Appeal from the County Court at Law No.3 of Harris County, Texas (Tr.Ct. No. 713,780). Opinion delivered by Justice Ross, Chief Justice Cornelius and Justice Grant Participating

JUDGMENT

BE IT REMEMBERED, that in accordance with the Courts opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it is **ORDERED** that the judgment of the court below is in all things **AFFIRMED**.

It is further **ORDERED** that the appellants pay all costs incurred by reason of this appeal.

RENDERED MAY 21, 2002
BY ORDER OF THE COURT
WILLIAM J. CORNELIUS
CHIEF JUSTICE

ATTEST:
Linda Rogers, Clerk

Court of Appeals
Sixth Appellate District
State of Texas

May 21, 2002

Hon. Richard Tomlinson
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Houston, TX 77002

RE: Appellate Case Number: 06-01-00067-CV
Trial Court Case Number: 713780

Style: John Breckenridge, Shirley Breckenridge, Richard Haas and Karen Haas
v.
Nationsbank of Texas, N.A.

The Court entered its order this date in the referenced proceeding whereby Appellants' Second Motion for rehearing was **OVERRULED**.

PLEASE TAKE DUE NOTICE HEREOF.

This Court's Opinion of May 1, 2002, is hereby withdrawn and this substituted therefor.

A true copy of this Court's Opinion and Judgment is enclosed.

Respectfully yours,

Linda Rogers, Clerk

BY _____
Deputy

cc: Hon. Lynn M. Bradshaw-Hull, Judge Presiding
Ms. Beverly Kaufman, County Clerk

APPENDIX B

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-01-00067-CV

JOHN BRECKENRIDGE, SHIRLEY BRECKENRIDGE, RICHARD HAAS, AND KAREN HAAS, Appellants

v.

NATIONSBANK OF TEXAS, N.A., Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court No. 713,780

Before Cornelius, C.J., Grant and Ross, JJ.
Opinion by Justice Ross

OPINION

Nationsbank of Texas, N.A. sued John Breckenridge, Shirley Breckenridge, Richard Haas, and Karen Haas (Appellants) for damages arising from a breach of a retail installment contract for the sale of a mobile home, and for possession of the mobile home, which served as collateral under the contract. The Bank pled breach of contract by the Breckenridges and conversion by the Haases. The Breckenridges filed counterclaims against the Bank for violations of the Truth-in-Lending Act and the Texas Deceptive Trade Practices Act.[1] After a bench trial, the court rendered judgment in favor of the Bank against the Breckenridges jointly and severally for $68,638.39, prejudgment interest from September 5, 2000, to the end of the trial, attorney's fees, postjudgment interest, all costs incurred by the Bank, and the recovery by the Bank of the mobile home. The court rendered judgment in favor of the Bank against the Haases, ordering the Haases to immediately remove themselves from and quit the mobile home. The court rendered judgment in favor of the Bank on the claims of violations of the Truth-in-Lending Act. The court rendered judgment in favor of the Breckenridges against the Bank on their counterclaim under the Deceptive Trade Practices Act (DTPA) for forum abuse, awarding the Breckenridges $115.20 and $2,500.00 in attorney's fees. The Bank does not challenge the court's ruling on abuse of forum under the DTPA.

The Appellants allege three points of error. They first contend the trial court erred in denying their motion to dissolve a writ of sequestration. Second, the Appellants contend the trial court erred in granting judgment in favor of the Bank because

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[1] See 15 U.S.C.A. § 1601, et seq. (West 1998 & Supp. 2001); TEX. BUS. & COM. CODE ANN. § 17.01, et seq. (Vernon 1987 & Supp. 2002).

the Breckenridges established all of their affirmative defenses: (a) presentment and demand, (b) notice of default and opportunity to cure, and (c) waiver of timely payment. Finally, the Appellants contend the trial court erred in finding the Bank did not violate the Truth-in-Lending Act.

The Bank is the assignee of a retail installment contract signed by the Breckenridges. The Breckenridges signed the contract as "joint purchasers" in March 1998 for the purchase of a mobile home from Victory Mobile Homes, a dealer located in Spring, Texas. The Breckenridges promised "to pay the Secured Party or its Assigns" in accordance with the terms of the contract. According to the testimony, the Breckenridges purchased the mobile home fort he Haases, thei rdaughter and son-in-law, and the Haases were to make the payments. Although there was no written agreement, Richard testified the agreement between the Haases and the Breckenridges was that the Breckenridges were "not going to pay a dime." The installment contract for the mobile home is not assumable, and neither of the Haases is a party to that contract. There is no evidence in the record that the Breckenridges ever made any monthly payments as provided in the contract.

From the beginning of the contract, the Appellants were continuously behind in their payments to the Bank. The first payment was due in April 1998. The Bank contacted the Breckenridges on May 7, 1998, regarding the April payment and was informed the Haases were to make payments. On May 7, 1998, the Bank contacted Richard, who said he would i-nail the payment that day. On May21, 1998, the Bank again contacted the Breckenridges regarding the delinquent April payment. John again informed the Bank the Haases lived in the mobile home and were to make the payments. John gave the Bank the Haases' telephone number. Despite letters from the Bank regarding notice of default and the right to cure the

default, the Appellants remained behind in payments until bringing the account current on September 23, 1998.

The Appellants made no more payments after curing the default in September 1998. Richard testified he has no recollection of making any payments after September 1998. The Bank left messages with Richard and the Breckenridges in November regarding the October payment. On December 2, 1998, the Bank informed the Breckenridges that the Raases had failed to return the Bank's calls, that the account would not be held any longer, and that satisfactory arrangements must be made by the next day or the matter would be referred out for repossession. On December 5, 1998, the Breckenridges reported to the Bank that the Haases were not returning their calls, either. They told the Bank to proceed with posting an eviction notice and picking up the mobile home. The Haases never vacated the mobile home, and the Bank sued to recover the debt and for possession of the mobile home.

In their first point of error, the Appellants contend the trial court wrongfully issued and should have dissolved the writ of sequestration. They contend the trial court erred in finding the hearing on the motion to dissolve the writ of sequestration was untimely. On March Ii, 1999, the trial court granted the Bank's ex parte application for writ of sequestration. In May 1999, Richard filed a motion pro se to quash the writ, signing it on his behalf and purportedly on behalf of his wife. Richard failed to request a hearing on the motion, but the Bank never followed through on seeking execution of the writ. In February 2000, the trial court entered a default judgment as to all four defendants, but granted a new trial in the case in March 2000. On May 22, 2000, the Appellants filed a motion to dissolve the writ of sequestration, and a hearing was set for May 31, 2000. The hearing was postponed by informal agreement of the parties until June 29, 2000. Then, pursuant to a written Rule 11 agreement, the hearing was again postponed until August 23,

2000. On the date of the hearing, the trial court denied the Appellants' motion to dissolve the writ of sequestration without receiving any evidence, ruling on the record the hearing was untimely for not being held within ten days of the filing of the motion. See TEX. C PRAC. & REM. CODE ANN. § 62.042 (Vernon 1997). The trial court denied the Appellants' motion for reconsideration on August 25, 2000.

The Bank contends the Appellants were not entitled to file the May 22, 2000, motion to dissolve the writ of sequestration because Richard had filed a motion to quash in May 1999. The Bank implies that all the Appellants were bound by Richard's motion and that the trial court could not consider the May 22, 2000, motion. However, the Bank never objected to the Appellants' filing of the May 22, 2000, motion. By failing to object, the Bank has waived this complaint on appeal. TEX. R. APP. P. 33.1. We address the Appellants' complaint that the trial court erred in failing to dissolve the writ of sequestration.

The trial court properly denied the motion to dissolve because no hearing was held within ten days of the filing of the May 22, 2000, motion. Under Section 62.042, "Unless the parties agree to an extension, the court shall conduct a hearing on the motion and determine the issue not later than the 10th day after the motion is filed." TEX. CIV. PRAC. & REM. CODE ANN. § 62.042. Rule 712a also requires that the motion to dissolve be determined not later than ten days after the motion is filed. TEX. R. Civ. P. 712a. The hearing on the motion occurred well after the ten-day requirement.

The Bank opposed the motion to reconsider the denial of the motion to dissolve, asserting that, unless all the agreements to postpone the hearing on the motion were in writing pursuant to Rule 11, the hearing was untimely. See TEX. R. C P. 11. There is no written agreement in the record between the parties regarding the postponement of the May 31 hearing. There is a

written agreement concerning the postponement of the June 29, 2000, hearing.

Rule 11 requires, "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." The Appellants contend Rule 11 is inapplicable. They assert that "there was no rule like Rule 11 in effect at the time the sequestration statute was amended in 1975 (nor when the amended sequestration rule was promulgated in 1978), and thereby no legislative intent to require agreements to postpone dissolution hearings to be in writing." This contention is incorrect. Rule 11 of the Texas Rules of Civil Procedure became effective on September 1, 1941. *Kennedy v. Hyde*, 682 S.W.2d 525, 528 (Tex. 1984); *Alcantar v. Okla. Nat'l Bank*, 47 S.W.3d 815,819 n.2 (Tex. App.-Fort Worth 2001, no pet.).

> This rule is not of recent origin, but can be traced in substantially its present form to District Court Rule 28, adopted in 1840 under the laws of the Republic of Texas, I Tex. 849, 852 (1848), and recodified as District and County Court Rule 47 in 1877 by authority of article V, section 25 of the Texas Constitution. See 47 Tex. 597, 625 (1877).

Kennedy, 682 S.W.2d at 526. "Rule 47 was amended in 1892 by adding the phrase 'or unless it be made in open court and entered of record.' 84 Tex. 695, 715, 19 S.W. 889." *Id.* at 526 n.1. The portion of Rule 11 at issue in this case is unchanged since 1877. The original rationale for the rule was stated cogently in *Birdwell v. Cox*, 18 Tex. 535, 537 (1857):

> Agreements of counsel, respecting the disposition of causes, which are merely verbal, are very liable to be misconstrued or forgotten, and to beget

misunderstandings and controversies; and hence there is great propriety in the rule which requires that all agreements of counsel respecting their causes shall be in writing, and if not, the court will not enforce them. They will then speak for themselves, and the court can judge of their import, and proceed to act upon them with safety. The rule is a salutary one, and ought to be adhered to whenever counsel disagree as to what has transpired between them.

Even if Rule 11 had not been in existence at the time the rules governing sequestration proceedings were adopted, the Rules of Civil Procedure govern all proceedings brought after those rules took effect September 1, 1941. TEX. R. C P.814; *Stieler v. Stieler*, 537 S.W.2d 954, 956-57 (Tex. Civ. App.-Austin 1976, writ ref'd n.r.e.) (despite referral to effective date of September 1, 1941, Rule 814 has been applied to subsequent amendments to rules).

The Appellants' alternative argument that "slavish adherence" to the language of Rule 11 is not required in all cases is correct. *Kennedy*, 682 S.W.2d at 529. However, we review the trial court's adherence to such rule under an abuse of discretion standard The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action; rather, it is a question of whether the court acted without reference to any guiding rules or principles, and the mere fact that a trial court may decide a matter within its discretionary authority differently than an appellate court does not demonstrate such an abuse. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Under an abuse of discretion standard, the court of appeals cannot overrule the trial court's decision unless the trial court acted unreasonably or in an arbitrary manner, without reference

to guiding rules or principles. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). Moreover, the court of appeals cannot substitute its judgment for the trial court's reasonable judgment even if it would have reached a contrary conclusion. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992); *Beaumont Bank, N.A.*, 806 S.W.2d at 226. The trial court does not abuse its discretion if some evidence reasonably supports the trial court's decision. *Rugen v. Interactive Bus. Sys.*, 864 S.W.2d 548, 551 (Tex. App.-Dallas 1993, no writ).

In this case, the trial court did not act without guiding principles. Rule 11 clearly states the trial court is not bound by oral agreements between the parties. The trial court was faced with a hearing clearly scheduled outside the ten-day time frame mandated by statute, and there was no agreement in the record showing the parties agreed to the postponement. The trial court did not abuse its discretion in applying Rule 11.

In their second point, the Appellants complain the trial court erred in failing to file additional findings of fact and conclusions of law in response to their properly and timely requested additional findings of facts and conclusions of law on the elements of their affirmative defenses. We found that the Appellants were correct and abated the case to the trial court to make the requested findings.[2] The trial court filed these additional findings of facts and conclusions of law, and we requested supplemental briefing from the parties as to these findings.

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The Appellants contend that, despite the language of the guaranty provision, the Breckenridges did not waive their right to presentment and demand. They assert that a strict, narrow reading of the guarantor provision is required because, in the construction of language in a contract, we ordinarily give the language its plain, grammatical meaning. *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 529 (Tex. 1987). The Appellants contend that such a reading of the guaranty provision limits the waiver of the Breckenridges to their role as guarantors and that there is no evidence the Breckenridges waived presentment and demand in their capacity as makers of the contract.

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(3) Credit transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected

Truth-in-Lending Act does not apply to [c]redit" transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer, in which the total amount financed exceeds $25,000." 15 U.S.C.A. § 1603(3) (West 1998). The Appellants contend the trial court erred in holding the transaction was exempt because the Bank has waived this defense by failing to plead it before trial.

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(5) Transactions for which the Board, by rule, determines that coverage under this subchapter [U.S.C.A. § 1601, et seq.] is not necessary to carry out the purposes of this subchapter.

. . .

(7) Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.).

15 U.S.C.A. § 1603 (West 1998).

disputed transaction is covered by Truth-in-Lending Act); *Brekke v. Volcker*, 652 F. Supp. 651, 654 (D. Mont. 1987) (plaintiffs failed to allege facts from which court could conclude Truth-in-Lending Act was applicable); *McDonnell v. Von Felt*, 604 N.W.2d 305 (Wis. Ct. App. 1999). " depends upon an extension of credit, wherein the underlying transaction qualifies as a consumer credit transaction and not one for 'business or commercial purposes." *Gerasta V. Hibernia Nat'l Bank*, 411 F. Supp. 176, 185 (E.D. La. 1975), *aff'd in part & rev'd in part on other grounds*, 575 F.2d 580 (5th Cir. 1978); see 15 U.S.C.A. § 1601, 1602(h).

The Appellants point to *United States v. First City Nat'l Bank*, 386 U.S. 361, 366, 87 S.Ct. 1088, 18 L.Ed.2d 151 (1967), and *Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37,44-45,68 S.Ct. 822,92 L.Ed. 1196(1948), in support of their contention the Bank had the burden of proof to show this transaction was exempt under the statute. These cases hold that the general rule is the party who claims the benefits of an exception to the prohibition of a statute bears the burden of proof. *First City Nat''l Bank*, 386 U.S. at 366; *Morton Salt Co.*, 334 U.S. at 44-45. Both of these cases dealt with situations where the actions of the defendants were generally prohibited by law. *First City National Bank* involved the merger of two banks and whether they were exempt from prohibitions of merging under antitrust laws via an exemption. This is not a case in the Truth-in-Lending Act. As the more recent decision from the Third Circuit holds, the burden is onthe plaintiff alleging violation of the Truth-in-Lending Act to show that the transaction is the type covered by the Act. *Katz*, 496 F.2d at 751. The court found the amount financed exceeds $25,000.00; the contract relates to personal property, not real property; and the Breckenridges affirmatively represented that the mobile home acquired was not to be their principal dwelling. The

evidence proves the transaction qualifies as an exempt transaction under Section 1603(3).

In their motion for rehearing, the Appellants correctly point out that the Truth-in- Lending Act is to be construed strictly against creditors and liberally in favor of consumers. *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 621 (6th Cir. 2002); *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 477, 482 (5th Cir. 1995). In *Inge*, the court reversed the district court's finding that the plaintiff had failed to state a claim by holding that the plaintiff had sufficiently pled her cause of action and is limited to an interpretation of Section 1605(f) of the Truth-in-Lending Act. *Inge*, 281 F.3d at 621-22. We find the Bank did not have to plead the transaction's exemption as an affirmative defense and affirm the trial court's finding regarding the Truth-in-Lending Act. Because the Appellants did not attack the merits of the trial court's findings, we need not address whether the trial court's findings regarding the transaction were correct.

We affirm the judgment.

Donald R. Ross
Justice

Date Submitted: February 28, 2002
Date Decided: May 1, 2002
Publish

FILED IN
The Court of Appeals
Sixth District
May 01, 2002
Texarkana, Texas
Linda Rogers, Clerk

Court of Appeals
Sixth Appellate District of Texas

No. 06-01-00067-CV

John Breckenridge, Shirley Breckenridge, Richard Haas, and Karen Haas, Appellants

v.

Nationsbank of Texas, N.A., Appellee

Appeal from the County Court at Law No.3 of Harris County, Texas (Tr.Ct. No. 713,780). Opinion delivered by Justice Ross, Chief Justice Cornelius and Justice Grant Participating

JUDGMENT

BE IT REMEMBERED, that in accordance with the Courts opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it is **ORDERED** that the judgment of the court below is in all things **AFFIRMED**.

It is further **ORDERED** that the appellants pay all costs incurred by reason of this appeal.

RENDERED MAY 1, 2002
BY ORDER OF THE COURT
WILLIAM J. CORNELIUS
CHIEF JUSTICE

ATTEST:
Linda Rogers, Clerk

Court of Appeals
Sixth Appellate District
State of Texas

May 1, 2002

Hon. Richard Tomlinson
Attorney at Law
One Greenway Plaza
Suite 100
Houston, TX 77046

Hon. Eric S. Lipper
Hirsch & Westheimer, PC
700 Louisiana
25th Floor
Houston, TX 77002

Hon. Michael D. Conner
Hirsch & Westheimer, PC
700 Louisiana, 25th Floor
Houston, TX 77002

RE: Appellate Case Number: 06-01-00067-CV
Trial Court Case Number 713780

Style: John Breckenridge, Shirley Breckenridge, Richard Haas and Karen Haas
v.
Nationsbank of Texas, N.A.

The Court entered its order this date in the referenced proceeding whereby Appellants' Second Motion for rehearing was **OVERRULED**.

PLEASE TAKE DUE NOTICE HEREOF.

This Court's Opinion of March 19, 2002, is hereby withdrawn and this substituted therefor.

A true copy of this Court's Opinion and Judgment is enclosed.

Respectfully yours,

Linda Rogers, Clerk

BY _____
Deputy

cc: Hon. Lynn M. Bradshaw-Hull, Judge Presiding
Ms. Beverly Kaufman, County Clerk

APPENDIX C

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-01-00067-CV

JOHN BRECKENRIDGE, SHIRLEY BRECKENRIDGE, RICHARD HAAS, AND KAREN HAAS, Appellants

v.

NATIONSBANK OF TEXAS, N.A., Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court No. 713,780

Before Cornelius, C.J., Grant and Ross, JJ.
Opinion by Justice Ross

OPINION

Nationsbank of Texas, N.A. sued John Breckenridge, Shirley Breckenridge, Richard Haas, and Karen Haas (Appellants) for damages arising from a breach of a retail installment contract for the sale of a mobile home, and for possession of the mobile home, which served as collateral under the contract. The Bank pled breach of contract by the Breckenridges and conversion by the Haases. The Breckenridges filed, counterclaims against the Bank for violations of the Truth-in-Lending Act and the Texas Deceptive Trade Practices Act.[1] After a bench trial, the court rendered judgment in favor of the Bank against the Breckenridges jointly and severally for $68,638.39, prejudgment interest from September 5, 2000, to the end of the trial, attorney's fees, postjudgment interest, all costs incurred by the Bank, and the recovery by the Bank of the mobile home. The court rendered judgment in favor of the Bank against the Haases, ordering the Haases to immediately remove themselves from and quit the mobile home. The court rendered judgment in favor of the Bank on the claims of violations of the Truth-in-Lending Act. The court rendered judgment in favor of the Breckenridges against the Bank on their counterclaim under the Deceptive Trade Practices Act (DTPA) for forum abuse, awarding the Breckenridges $115.20 and $2,500.00 in attorney's fees. The Bank does not challenge the court's ruling on abuse of forum under the DTPA.

The Appellants allege three points of error. They first contend the trial court erred in denying their motion to dissolve a writ of sequestration. Second, the Appellants contend the

---

[1] See 15 U.S.C.A. § 1601, et seq. (West 1998 & Supp. 2001); TEX. BUS. & COM. CODE ANN. § 17.01, et seq. (Vernon 1987 & Supp. 2002).

trial court erred in granting judgment in favor of the Bank because the Breckenridges established all of their affirmative defenses: (a) presentment and demand, (b) notice of default and opportunity to cure, and (c) waiver of timely payment. Finally, the Appellants contend the trial court erred in finding the Bank did not violate the Truth-in-Lending Act.

The Bank is the assignee of a retail installment contract signed by the Breckenridges. The Breckenridges signed the contract as "joint purchasers" in March 1998 for the purchase of a mobile home from Victory Mobile Homes, a dealer located in Spring, Texas. The Breckenridges promised "to pay the Secured Party or its Assigns" in accordance with the terms of the contract. According to the testimony, the Breckenridges purchased the mobile home for the Haases, their daughter and son-in-law, and the Haases were to make the payments. Although there was no written agreement, Richard testified the agreement between the Haases and the Breckenridges was that the Breckenridges were "not going to pay a dime." The installment contract for the mobile home is not assumable, and neither of the Haases is a party to that contract. There is no evidence in the record that the Breckenridges ever made any monthly payments as provided in the contract.

From the beginning of the contract, the Appellants were continuously behind in their payments to the Bank. The first payment was due in April 1998. The Bank contacted the Breckenridges on May 7, 1998, regarding the April payment and was informed the Haases were to make payments. On May 7, 1998, the Bank contacted Richard, who said he would mail the payment that day. On May 21, 1998, the Bank again contacted the Breckenridges regarding the delinquent April payment. John again informed the Bank the Haases lived in the mobile home and were to make the payments. John gave the Bank the Haases' telephone number. Despite letters from the

Bank regarding notice of default and the right to cure the default, the Appellants remained behind in payments until bringing the account current on September23, 1998.

The Appellants made no more payments after curing the default in September 1998. Richard testified he has no recollection of making any payments after September 1998. The Bank left messages with Richard and the Breckenridges in November regarding the October payment. On December 2, 1998, the Bank informed the Breckenridges that the Haases had failed to return the Bank's calls, that the account would not be held any longer, and that satisfactory arrangements must be made by the next day or the matter would be referred out for repossession. On December 5, 1998, the Breckenridges reported to the Bank that the Haases were not returning their calls, either. They told the Bank to proceed with posting an eviction notice and picking up the mobile home. The Haases never vacated the mobile home, and the Bank sued to recover the debt and for possession of the mobile home.

We first address the Appellants' second point of error, as it is dispositive of their first point. In connection with their second point, the Appellants complain the trial court erred in failing to file additional findings of fact and conclusions of law in response to their properly and timely requested additional findings of facts and conclusions of law on the elements of their affirmative defenses. We found that the Appellants were correct and abated the case to the trial court to make the requested findings.[2] The trial court filed these additional findings of facts and conclusions of law, and we requested supplemental briefing from the parties as to these findings.

---

[2] Buzbee v. Buzbee, 870 S.W.2d 335, 336 (Tex. App.-Waco 1994, no writ), where the same procedure was followed.

The Appellants contend the trial court erred in finding against them on their affirmative defenses. They contend the evidence is legally and factually insufficient to support the trial court's findings. The Appellants pled three affirmative defenses:

> (a) presentment and demand; (b) notice of default and opportunity to cure; and (c) waiver of timely payment. The Appellants had the burden of proof on their affirmative defenses. The appropriate challenge to a fact-finder's finding concerning an issue on which the complaining party had the burden of proof is either a matter of law point or a great weight and preponderance point. *Raw Hide Oil& Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275-76 (Tex. App.-Amarillo 1988, writ denied).

In reviewing matter of law points, we must examine the record for evidence that supports the finding, ignoring any evidence to the contrary; and, if there is no evidence to support the finding, we must then examine the entire record to determine if a contrary proposition is established as a matter of law. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). In reviewing great weight and preponderance points, we must examine the entire record to determine if there is some evidence to support the finding, and then determine whether, in light of the entire record, the finding is manifestly unjust. *Traylor V. Goulding*, 497 S.W.2d 944, 945(Tex. 1973); *In re King's Estate*, 150 Tex. 662,244 S.W.2d 660,661 (1951).

The Appellants appeal the court's finding that the Breckenridges waived their right to presentment and demand by signing the retail installment contract as guarantors. John signed the contract as purchaser and guarantor, and Shirley signed as joint purchaser and joint guarantor. The trial court

found in its conclusions of law the Breckenridges waived acceptance, presentment, demand, protest, notice of protest, notice of dishonor, and any other conditions of their liability by executing the guaranty portion of the contract. The guaranty provision of the contract includes the following language: "The undersigned consent to and waive. . . presentment, demand, protest, notice of protest, notice of dishonor and any other conditions to the liability of the undersigned under this guaranty."

The Appellants contend this language in the guaranty section of the contract does not mean the Breckenridges waived presentment and demand in their capacity as makers of the contract, contending that, if the Breckenridges waived any right to presentment and demand, it was as guarantors and not as makers. The Appellants contend a strict, narrow reading of the guarantor provision is required under Texas law because, in the construction of language in a contract, we ordinarily give the language its plain, grammatical meaning. *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 529 (Tex. 1987). Because the language states: "The undersigned consent to and waive.. . presentment, demand, protest, notice of protest, notice of dishonor and any other conditions to the liability of the undersigned under this guaranty," the Appellants contend this limits the waiver of the Breckenridges to their role as guarantors. There is no evidence the Breckenridges waived presentment and demand in their capacity as makers of the contract.

Nonetheless, the Bank sued the Breckenridges generally under the note, thereby suing them in both capacities, as makers and guarantors. As guarantors, the Breckenridges clearly waived their right to presentment and demand, as well as their other affirmative defenses. The contract provides, "The undersigned agrees to pay all amounts owing hereunder upon

demand, without requiring any prior action or proceedings against the Purchasers or the Collateral." Because the Bank sued the Breckenridges in their capacity as guarantors, the trial court properly held the Breckenridges liable under the contract. The Appellants' second point of error is overruled.

Because the trial court properly found in favor of the Bank, and the judgment awards the Bank the mobile home, there is no need to address the Appellants' first point of error that the trial court wrongfully issued and should have dissolved the writ of sequestration.

In their third point of error, the Appellants contend the trial court erred in finding the Bank did not violate the Truth-in-Lending Act. The Appellants complained the trial court failed to file additional findings of fact and conclusions of law in response to their properly and timely requested additional findings of fact and conclusions of law on the elements of the Truth-in-Lending Act. We found the trial court should have filed these additional findings of fact and conclusions of law, and abated the case to the trial court to make the requested findings. The trial court filed these additional findings of fact and conclusions of law, and we requested supplemental briefing from the parties as to these findings.

The Appellants contend the trial court erred in finding the federal Truth-in-Lending .Act does not apply to this case as a matter of law. The trial court held the contract evidences a transaction that is an "exempted transaction" as defined by

Section 1603 of the Truth-in-Lending Act.[3] The Truth-in-Lending Act does not apply to "[c]redit transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer, in which the total amount financed exceeds $25,000." 15 U.S.C.A. § 1603(3) (West 1998). The Appellants contend the court need not reach the merits of this affirmative defense

---

[3] The following exemptions are provided in the Act:

> (1) Credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations.
>
> (2) Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.
>
> (3) Credit transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer, in which the total amount financed exceeds $25,000.
>
> (4) Transactions under public utility tariffs, if the Board determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.
>
> (5) Transactions for which the Board, by rule, determines that coverage under this subchapter [15 U.S.C.A. § 1601, et seq.] is not necessary to carry out the purposes of this subchapter.
>
> . . .
>
> (7) Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.).

15 U.S.C.A. § 1603 (West 1998).

because the Bank has waived this defense by failing to plead it before trial.

The Appellants contend the exemption to the statute is like an affirmative defense that is waived if not affirmatively pled. However, the burden to show that the transaction falls within the Truth-in-Lending Act is on the Appellants in this case. In order to establish the creditor's liability under the Truth-in-Lending Act, the complaining party must show that the disputed transaction is the type of transaction covered by the Act. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 751 (3d Cir. 1974). The Appellants point to *United States v. First City Nat'l Bank*, 386 U.S. 361,366,87 S.Ct. 1088, 18 L.Ed.2d 151 (1967), and *Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37,44-45,68 S.Ct. 822,92 L.Ed. 1196(1948), in support of their contention the Bank had the burden of proof to show this transaction was exempt under the statute. These cases hold that the general rule is the party who claims the benefits of an exception to the prohibition of a statute bears the burden of proof. *First City Nat'l Bank*, 386 U.S. at 366; *Morton Salt Co.*, 334 U.S. at 44-45. Both of these cases dealt with situations where the actions of the defendants were generally prohibited by law. *First City National Bank* involved the merger of two banks and whether they were exempt from prohibitions of merging under antitrust laws via an exemption. This is not a case in the Truth-in-Lending Act. As the more recent decision from the Third Circuit holds, the burden is on the plaintiff alleging violation of the Truth-in-Lending Act to show that the transaction is the type covered by the Act. *Katz*, 496 F.2d at 751. The court found the amount financed exceeds $25,000.00; the contract relates to personal property, not real property; and the Breckenridges affirmatively represented that the mobile home acquired was not to be their principal dwelling. The

evidence proves the transaction qualifies as an exempt transaction under Section 1603(3).

We find the Bank did not have to plead the transaction's exemption as an affirmative defense and affirm the trial court's finding regarding the Truth-in-Lending Act. Because the Appellants did not attack the merits of the trial court's findings, we need not address whether the trial court's findings regarding the transaction were correct.

We affirm the judgment.

Donald R. Ross
Justice
Date Submitted: February 28, 2002
Date Decided: March 19, 2002
Publish

FILED IN
The Court of Appeals
Sixth District
March 19, 2002
Texarkana, Texas
Linda Rogers, Clerk

Court of Appeals
Sixth Appellate District of Texas

No. 06-01-00067-CV

John Breckenridge,
Shirley Breckenridge,
Richard Haas, and
Karen Haas, Appellants

v.

Nationsbank of Texas,
N.A., Appellee

Appeal from the County
Court at Law No.3 of
Harris County, Texas
(Tr.Ct. No. 713,780).
Opinion delivered by Justice
Ross, Chief Justice Cornelius
and Justice Grant
Participating

JUDGMENT

BE IT REMEMBERED, that in accordance with the Courts opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it is **ORDERED** that the judgment of the court below is in all things **AFFIRMED**.

It is further **ORDERED** that the appellants pay all costs incurred by reason of this appeal.

RENDERED MARCH 19, 2002
BY ORDER OF THE COURT
WILLIAM J. CORNELIUS
CHIEF JUSTICE

ATTEST:
Linda Rogers, Clerk

Court of Appeals
Sixth Appellate District
State of Texas

March 19, 2002

Hon. Richard Tomlinson
Attorney at Law
One Greenway Plaza
Suite 100
Houston, TX 77046

Hon. Eric S. Lipper
Hirsch & Westheimer, PC
700 Louisiana
25th Floor
Houston, TX 77002

Hon. Michael D. Conner
Hirsch & Westheimer, PC
700 Louisiana, 25th Floor
Houston, TX 77002

RE: Appellate Case Number: 06-01-00067-CV
Trial Court Case Number: 713780

Style: John Breckenridge, Shirley Breckenridge, Richard Haas and Karen Haas
v.
Nationsbank of Texas, N.A.

The judgment of the Trial Court in the referenced proceeding on appeal from Harris County was this date **AFFIRMED**, in conformity with the written Opinion of this Court of even date.

A true copy of this Court's Opinion and Judgment is enclosed.

Respectfully yours,

Linda Rogers, Clerk

BY _____
Deputy

cc: (w/copy of enclosures)
Hon. Lynn M. Bradshaw-Hull, Judge Presiding
Ms. Beverly Kaufman, County Clerk

APPENDIX D

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
512-463-1312

September 5, 2002

Mr. Richard Tomlinson
1 Greenway Plaza, Suite 100
Houston, Texas 77046

Mr, Michael D. Conner
Hirsch & Westheimer
700 Louisisana, 25th Floor
Houston, Texas 77002

RE: Case Number: 02-0597
Court of Appeals Number: 06-01-00067-CV
Trial Court Number: 713,780

Style: JOHN BRECKENRIDGE, SHIRLEY BRECKENRIDGE, RICHARD HAAS, AND KAREN HAAS
v.
NATIONSBANK OF TEXAS, N.A.

Dear Counsel:

Today the Supreme Court of Texas denied the petition for review as supplemented in the above styled case.

Sincerely,
Andrew Weber, Clerk

by _____
Patricia A. Cook
Chief Deputy Clerk

cc: Ms. Beverly Kaufman
Mr. Linda Rogers, Clerk

APPENDIX E

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
512-463-1312

October 31, 2002

Mr. Richard Tomlinson
1 Greenway Plaza, Suite 100
Houston, Texas 77046

Mr, Michael D. Conner
Hirsch & Westheimer
700 Louisisana, 25th Floor
Houston, Texas 77002

RE: Case Number: 02-0597
Court of Appeals Number: 06-01-00067-CV
Trial Court Number: 713,780

Style: JOHN BRECKENRIDGE, SHIRLEY BRECKENRIDGE, RICHARD HAAS, AND KAREN HAAS
v.
NATIONSBANK OF TEXAS, N.A.

Dear Counsel:

Today the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Sincerely,
Andrew Weber, Clerk

by _____
Patricia A. Cook
Chief Deputy Clerk

cc: Ms. Beverly Kaufman
Mr. Linda Rogers, Clerk